NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF THE RESPONDENTS

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NO. 80-120

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

STATEMENT OF THE CASE

In 1977, the State Legislature amended SDCL 61-1-10.4 so that it would conform to the federal law concerning unemployment taxation. In 1976, Congress amended the Unemployment Compensation Act and specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools. The Petitioners in this case contend that under SDCL 61-1-10.4, they are still exempt from the payment of unemployment taxes on their school

personnel. Petitioners received a hearing before a hearing examiner from the Department of Labor. The Examiner held that they were responsible for paying the taxes. Petitioners asked for a review. The Appeals Referee from the Department of Labor entered his decision on September 15, 1978, holding that the Petitioners must pay the unemployment tax. The Petitioners appealed to the Circuit Court in Hughes County and Judge Miller on April 2, 1979, reversed the Appeals Referee and held that the Petitioners were exempt from paying the unemployment tax. The State of South Dakota appealed to the Supreme Court of that state and the case was reversed March, 1980.

Northwestern Lutheran Academy is a four-year preparatory school for entrance at Northwestern College or Dr. Martin Luther College in preparation for the preaching and teaching ministry of the Wisconsin Evangelical Lutheran Synod. Its faculty consists of five pastors and five teachers. St. Martin's Evangelical Lutheran Church is a Lutheran church of the Wisconsin Evangelical Lutheran Synod and operates an elementary school whose faculty consists of two male teachers, claimed to be "ministers of a church" and four other teachers.

Northwestern Lutheran Academy, which is not separately incorporated, and St. Martin's Evangelical Lutheran Church, which is separately incorporated as a church under South Dakota law, are both exempt organizations under Sec. 501(c)(3) of the Internal Revenue Code pursuant to a group ruling issued to the Wisconsin Evangelical Lutheran Synod, as are all other affiliates of the Wisconsin Evangelical Lutheran Synod, whether separately incorporated or not.

Prior to January 1, 1978, SDCL 61-1-10.4, provided

that covered employment for unemployment compensation purposes did not apply to service performed:

(1) In the employ of

(a) a church of convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or

. . .

Pursuant to PL 94-566, the "Unemployment Compensation Amendments of 1976," the South Dakota Legislature in effect repealed subsection (3) of SDCL 61-1-10.4, by S.D. Sess.L. 1977, ch. 420, effective January 1, 1978.

STATUTORY BACKGROUND

Even at the height of the Great Depresson of the 1930's when unemployment in the nation remained for several years above 25 percent of the work force, the States had almost uniformly failed to enact unemployment compensation laws. Consequently, in Title IX of

the Social Security Act of 1935, 49 Stat. 62, the forerunner of the FUTA (Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq.), Congress imposed on employers, with eight or more employees, an excise tax consisting of a percentage of wages payable for services performed in "employment" as defined in the Act. 49 Stat. 635.[1] At the same time, the taxpayer could get a credit against his federal tax liability for up to 90 percent of his contributions into a State unemployment fund established under a federally approved State unemployment compensation law. 49 Stat. 639-640.[2] In addition, Congress also provided in Title III of the Social Security Act (now codified at 42 U.S.C. §§ 501-504) for federal grants to the States to pay for costs incurred in administering the state laws. 49 Stat. 626. Subsequently, every state enacted an unemployment compensation law meeting the requirements for federal approval.[3] For many years, no provisions of the federal statutes required the state laws to cover any specific class of employees in either the public or the private section. Nevertheless, the state laws in the main paralleled the coverage of the FUTA (See, e.g., the SDCL 61 et seq.) in order to obtain the benefits of the tax credit provisions for the local employers and reimbursement of certain costs by the federal government.

[1] Neither the original Social Security Act nor the FUTA has subjected nonprofit organizations, such as the instant Petitioners, to any federal unemployment or "excise" tax. This is because the definition of "employment" excludes service performed in the employ of a religious, charitable, educational, or other income tax exempt organization. See 26 U.S.C. 3306(c) (hereinafter "§ 53306(c)"), as amended by the Unemployment Compensation Amendments of 1976, P.L. No. 94-566, 90 Stat. 2667.

[2] These basic provisions have been continued under the FUTA. See 26 U.S.C. §§ 3301 and 3302, as amended, 1976.

[3] See 26 U.S.C. § 3304(a) (hereinafter "§ 3304(a)"), as amended, 1976, for correct requirements.

The federal unemployment or "excise" tax provisions remained substantially unchanged for the first two decades after their enactment, although in 1939 they were made part of the Internal Revenue Code. See 1600 et seq. of the Internal Revenue Code of 1939, 53 Stat. 1, 183. Beginning in the mid-1950's however, there commenced a steady expansion of unemployment insurance coverage. Thus for example, in 1954, the Congress extended the tax liability to employers with four or more employees and enacted an unemployment compensation program for federal employees. See, Pub.L. No. 81-167. 68 Stat. 1130. In 1958, an unemployment compensation program was enacted for ex-servicemen. See Pub.L. No. 85-848, 72 Stat. 1086, 1088.

The most far-reaching revisions in the Federal-State Unemployment Compensation Program, however, were enacted under the Employment Security Amendments Act of 1970, Pub.L. No. 91-373, 84 Stat. 695. These amendments not only extended coverage to employers of one employee (84 Stat. 696), but, more importantly, added subsection (5)(a) and (B) to the existing § 3304(a) and a new § 3309 to the Internal Revenue Code of 1954 ("53309").

The new § 3304(a) (6)(A) required state laws to cover, for compensation purposes, employees of nonprofit organizations and employees of state hospitals and institutions of higher education. 84 Stat. 697. Section 3304(a) (6)(B), in turn, provided that the nonprofit organization must be afforded the opportunity to elect to make payments in lieu of contributions by payng into the state unemployment compensation fund amounts equal to the amount of unemployment benefits attributed under the state law to service in the employ of the particular employer. See 26 U.S.C. § 3309(a)(2) (1970).

Subparagraph (b) of the new § 3309 permitted the states to exclude, *inter alia*, from the mandatory coverage of nonprofit organizations and state hospitals and institutions of higher education, service performed (see 84 Stat. 697-698):

> (1) in the employ of (A) a church or convention or association of churches, or (B) organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches . . . See 26 U.S.C. § 3309(b)(1) (1970);
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order (See 26 U.S.C. § 3309(b)(2) (1970));
>
> (3) in the employ of a school which is not an institution of higher education (See 26 U.S.C. § 3309(b)(3) (1970));

Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub.L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, (See Pub.L. No. 92-224, 65 Stat. 810) and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment Assistance Act of 1974 (Pub.L. No. 93-567, 88 Stat. 1845) enacted in Title II, a Special Unemployment Assistance ("SUA") Program. This program was in-

tended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including primarily state and local government employees, agricultural workers, and domestic employees. See House Report No. 93-1528, 4 U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess. 6756, 6758, 6760-6768 (1975). The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration. See Section 202 of the Emergency Jobs and Unemployment Assistance Act of 1974, §§ Stat. 1850.

The SUA program was in effect, replaced by the Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H.R. Rep. No. 755, 94th Cong., 1st Sess. 1 (1975). The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970, as part of the new § 3309(b) of the Internal Revenue Code of 1954.

The Federal Unemployment Tax Act is a comprehensive plan for unemployment compensation allowing for state and federal participation in its administration. Section 3301 of the Act imposes a federal unemployment tax, but Section 3302 of the Act permits tax credits against the federal tax to employers who have paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan, it must meet certain requirements set

out under Sections 3303 and 3304. While the Petitioners are exempted from the Federal Unemployment Tax by Section 3306(c)(8), Sections 3304(a)(6) and 3309 require participating states to tax certain charitable organizations exempted from the federal tax. However, subsection (b) of Section 3309 provides that state unemployment taxes shall not apply to services performed

> (1) in the employ of (A) a church or convention or association of churches, or (B) organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

In April of 1978, the Secretary of Labor charged with administering FUTA was called upon to determine whether church-related schools were exempted from state unemployment tax under Section 3309(b)(1). The Secretary's opinion, announced in a letter of April 18, 1978, addressed to the Most Reverend Thomas C. Kelly, General Secretary of United States Catholic Conference, declared:

> The repeal by Congress of the exclusion, in section 3309(b)(3) of the Federal Unemployment Tax Act, of employees of elementary and secondary schools was clearly intended to result in State coverage of church-related schools, whose employees constitute over 80% of the employees of all nonprofit schools. In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school.

The secretary's opinion resulted in a directive issued to all state employment agencies participating in the federal unemployment program requiring state agencies to assess unemployment compensation taxes against church-related schools. Under this construction of the statute, all of Petitioners' employees who are employed by elementary and secondary school establishments are subject to mandatory state unemployment coverage (see 26 U.S.C. § 3304(a)). The election of extension of this coverage under state law is a mandatory condition precedent to certification by the Secretary of Labor that the state statutes conform to the federal standards; the Secretary's certification in turn provides access to the system of tax credits and federal reimbursement of certain benefit costs.

The State of South Dakota, in order to continue its participation in FUTA, proposes to collect an unemployment tax from the Petitioners' administrators of elementary and secondary parochial schools, for the benefit of parochial teachers employed by the Petitioners. The state statute under which South Dakota seeks to assess this tax is designed specifically to comply with federal demands for participating states. SDCL 61-1-10.4. Further, this section is identical to Section 3309(b)(1)(A) and (B) of the Federal Unemployment Tax Act.

The Petitioners take issue with the Secretary of Labor's interpretation of 26 U.S.C. § 3309 and its application to them through SDCL 61-1-10.4. The Petitioners contend that any action by the South Dakota Department of Labor to collect unemployment compensation taxes against them would violate their First Amendment right under the Religious clauses.

It is the State's position that as a result of the Unemployment Compensation Amendments of 1976

(PL 94-566), employees of *all* private, nonprofit elementary and secondary school establishments must be included in a state's coverage. Section 3309(b)(2) permits continued exclusion for the services performed by a duly ordained minister of a church in the exercise of his ministry. Employees who do not work for a church-related elementary or secondary school establishment, but who work directly in the church or for an essentially religious organization may remain within the scope of the Section 3309(b)(1) exclusion.

While the statute, on its face, gives little guidance concerning the interrelation between the repeal of the § 3309(b)(3), school exemption and the retention of the § 3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute so as to include *all* elementary and secondary schools, such as those organized by the Petitioners within unemployment insurance coverage.

SUMMARY OF THE ARGUMENT

Since unemployment insurance was adopted in the 1930's, Congress has expanded the program to cover more and more employees. In interpreting the 1978 legislation on FUTA to cover employees of church schools, the Supreme Court of South Dakota followed the intent of Congress. The intent of Congress was that all secondary and elementary school employees be covered under FUTA when it revoked the exemptions for this area under 26 U.S.C. 3309(b)(3) in 1976, and that all services for educational institutions were to fall under the unemployment program. Taxes were to be paid for those employees by the employer, even if the employer was a church. In reaching its decision the Supreme Court of South Dakota not only followed the intent of Congress but the contemporaneous construction of the statute given the Department of Labor which was the agency charged with its administration.

The interpretation given to the statute by the Supreme Court of South Dakota does not violate the First Amendment religious clauses against either the establishment of a religion or a violation of the free Exercise of Religion. The Petitioner has failed to show what religious beliefs have been prohibited or burdened and has further failed to show any establishment of a religion in order to apply the excessive entanglement test of that clause. All contact between church and state is not prohibited by the Constitution and no excessive entanglement of any kind has been shown by the Petitioner in the application of the unemployment tax to church school employees, and therefore the Writ of Certiorari should not be issued.

ARGUMENT

I

THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976, REPRESENT THE CULMINATION OF CONGRESSIONAL EFFORTS TO PROVIDE VIRTUALLY UNIVERSAL UNEMPLOYMENT INSURANCE COVERAGE AND SHOULD BE CONSTRUED IN THAT LIGHT.

Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments, which:

> provide coverage under the permanent Federal-State Unemployment Compensation law for substantially all of the nation's wage and salary earners. . . .

H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo v. United States*, 272 U.S. 620 (1926), *Trinity Church v. United States*, 143 U.S. 457, 463 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *Commissioner of Internal Revenue v. Bilder*, 169 U.S. 499 (1962). *United States v. Ohio*, 354 F.2d 549, 555 (6th Cir. 1966). This directive takes on particular significance in the context of the instant case:

> Remedial social legislation . . . is to be construed liberally in favor of the workers whom it was designed to protect.

Wirtz v. Ti Ti Peat Humus Co., 373 F.2d 209, 212 (4th Cir. 1967). See also *United States v. Silk*, 331 U.S. 704 (1947); *Phillips, Inc. v. Wallings*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd. v. F.D.I.C.*, 536 F.2d 509, 513 (2nd Cir. 1976). Finally, the requirement that remedial legislation be broadly construed produces a correlative obligation that exemptions be narrowly applied:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. *To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.*

Phillips, Inc. v. Wallings, 324 U.S. 460, 493 (1945) (Emphasis supplied.) See also *Arnold v. Ben Fancwsky Inc.*, 361 U.S. 388 (1960); *Hamblen v. Ware*, 526 F.2d 476, 477 (6th Cir. 1975). The Petitioners cannot demonstrate qualifications allowing[4] § 3309(b)(1) exemptions but, rather, a review of the relevant legislative history clearly manifests a congressional intention to extend

[4] Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions:

> are to be narrowly construed against the employer *upon which the burden rests to show that it comes within the exemption. Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 394, 80 S.Ct. 453, 456, 457, 4 L.Ed.2d 393 (1960); *Mitchell v. Kentucky Finance Company*, 359 U.S. 290, 295, 79 S.Ct. 746, 759, 3 L.Ed.2d 815 (1959); *Yogurt Master, Inc. v. Goldbery*, 5 Cir., 1962, 310 F.2d 53, 55.

Schultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61, 67 (5th Cir. 1970). (Emphasis supplied.) Compare *United States v. Silk*, 331 U.S. 704, 712 (1947) with *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947).

coverage to all elementary and secondary schools regardless of whether they have religious affiliation or not.

II

CONGRESS INTENDED THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976 TO EXTEND UNEMPLOYMENT INSURANCE COVERAGE TO *ALL* ELEMENTARY AND SECONDARY SCHOOLS.

A brief review of the 1970 Amendments is necessary to properly understand the objective behind the 1976 Amendments.

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required state law coverage of individuals employed by nonprofit organizations (including institutions of higher education). The legislative reports accompanying the amendments unmistakably show that Congress intended to bring individuals employed in nonprofit institutions of higher education, including religious organizations, under program coverage. Thus the House Ways and Means Committee explained that:

> Under existing Federal law, services performed for nonprofit *religious, charitable, educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations.

> Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment.
>
> H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969). (Emphasis supplied.)

In fact, Congress, quite explicitly delineated the limits of the § 3309(b)(1) exemption as applied to institutions of higher education.

> The paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church or (convention of churches). *Thus, the services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered.*[5]
>
> A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church-related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

[5] Accordingly, the legislative history recognized the principle involved in cases decided under the Fair Labor Standards Act that exemptions are limited to employees of those *establishments* "clearly and unmistakably" within their terms. *Arnold v. Ben Kanowsky*, 361 U.S. 388, 392 (1960). See 29 C.F.R. §§ 779. 302-311, and compare *Mitchell v. Kroger Co.*, 248 F.2d 935, 940 (8th Cir. 1959).

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) (Emphasis supplied.) Identical language is found in S. Rep. No. 752, 91st Cong. 2nd Sess. (1970) at 48-59. Thus, Congress clearly expected in § 3309(b)(1)(b) be narrowly construed at least as applied to educational institutions. The Department of Labor has followed the congressional mandate and consistently interpreted the 1970 Amendments as requiring state unemployment insurance coverage of all institutions of higher education except for the narrow category including seminaries and novitiates.[6]

In light of Congress' apparent intention in 1970, to bring religiously affiliated colleges and universities within coverage, and in the fact of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is informative:

> Section 115(b) also has the effect of requiring the state to pay unemployment compensation on the basis of *services performed for all educational institutions*. Under existing law, the state is only required to provide coverage of services performed for institutions of higher education.

H.R. Rep. No. 755, 94th Cong., 1st Sess. § 6 (1975). (Emphasis supplied.)

> *Employees of the nonprofit elementary and secondary schools.* The bill would require the state to extend the coverage of their unemployment compensation programs to employees of nonprofit ele-

[6] In the summer of 1970, the Department published a document for the use of the states entitled, *Draft legislation to Implement the Employment Security Amendments of 1970...* H.R. 14705. The purpose of the volume was to suggest to the States the areas in which State unemployment compensation laws would have to be amended to remain in conformity with the 1970 Amendments. The Department's directives in the area of coverage of institutions of higher education is substantially a restatement of the language in the House and Senate Reports quoted above.

> mentary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during vacation periods to school employees of state and local governments would also apply to employees of nonprofit schools.
>
> The states would not be required to provide the new coverage until January 1, 1978.
>
> S. Rep. No. 1265, 94th Cong. 2nd Sess. 2 (1976).

Any lingering doubt concerning Congress' desire to extend coverage to *all* elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2nd Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure approximates the total number of teachers in *all* nonprofit elementary and secondary schools. Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all nonpublic elementary and secondary schools in the United States.[7]

Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring all elementary and secondary schools within FUTA. Considering the total absence of any indication that

[7] According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic schools. PP. 145, 147, tables 235, 237.

Congress intended an alternative interpretation and noting, particularly, the necessity that the exemptions to coverage be construed narrowly, the defendants' construction of the Act is virtually mandatory.

III

THE COURT SHOULD DEFER TO THE CONTEMPORANEOUS CONSTRUCTION OF THE STATUTE GIVEN BY THE AGENCY CHARGED WITH ITS ADMINISTRATION.

The importance of contemporaneous agency interpretation as a tool of statutory construction is well recognized:

> When faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the administration. . . . Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried or new.'

Udall v. Tallman, 380 U.S. 1, 16 (1965) quoting *Unemployment Commission v. Aragon*, 329 U.S. 143, 153 (1946). This principle has been recognized, generally, by the Courts of Appeals, *Wald Manufacturing Company v. N.L.R.B.*, 426 F.2d 1328 (6th Cir. 1970); *City of Tullahoma v. Coffee County Tennessee*, 328 F.2d 683 (6th Cir. 1964) and has been particularly noted with respect to the responsibilities of the Department of Labor, *American Fed. of State Cty. & M. Employees v. City of Cleveland*, 484 F.2d 338 (6th Cir. 1973).

Within months of the enactment of the Unemploy-

ment Compensation Amendments of 1970, the Department published its interpretation of those amendments which stated, *inter alia*, that the § 3309(b)(1) exemption for services performed for churches or religious organizations did not extend to services performed at religiously affiliated institutions of higher education. The position has been consistently maintained. The Department's view of the objective behind the 1976 Amendments represents a logical and necessary extension of the position which the Department has taken, without apparent objection, since 1970. The instant case presents more than the normal case for deference to an agency's statutory interpretation in view of congressional action, or more correctly inaction, in 1976 with respect to the Department's interpretation of § 3309(b)(1).

> The administrative interpretation, as evidenced by the applicable Rules of the Bureau of Immigration adopted in 1917 and carried forward in later regulations, has been uniform to the effect that no time limitation is applicable in a case like the present. *The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.*

Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932) (emphasis supplied), cited in *City of Tullahoma v. Coffee County Tennessee*, 328 F.2d 683, 691 (6th Cir. 1964). See *N.L.R.B. v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267, 278 (1974). The court should evaluate the statutory scheme both in light of Congress' apparent ratification of the Department of

Labor's interpretation of the 1970 Act, when enacting the 1976 Amendments, and the Department's contemporaneous construction of those Amendments.

IV

THE SECRETARY'S INTERPRETATION OF 26 U.S.C. § 3309 AND ITS APPLICATION THROUGH SDCL 61-1-10.4 DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Religion Clauses of the First Amendment of the United States Constitution, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," are aimed at preserving governmental neutrality in matters pertaining to religion while securing religious liberty to the individual. The Religion Clauses, as they are known, are of two parts, Establishment and Free Exercise. Although the two clauses thus serve a common purpose, and overlap, "they forbid two different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). See also *Abington School District v. Schempp*, 374 U.S. 203, 211 (1963). This is the second case before this Court where a church claims a violation of its rights under the free exercise clause. *Mitchell v. Pilgrim Holiness Church*, 210 F.2d 879 (1954 7th Cir.).

In order to demonstrate that legislation is in conflict with the Free Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp*, 374 U.S. at 223. Coercion alone, however, is insufficient to sustain a free exercise claim. Although the clause's protection of

religious beliefs is absolute, religiously based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Thus, even governmental regulations that inhibit conduct mandated by religious convictions, if justified by "interest of the highest order and those not otherwise served[,] can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The Petitioners' first amendment challenge to the Act fails to meet either of these criteria.

A. *Equal coverage of parochial school employees under the federal-state unemployment compensation program would not have a sufficiently coercive effect on Plaintiffs as to violate their first amendment rights.*

The Supreme Court has frequently recognized that "a violation of the Free Exercise Clause is predicated on coercion" and that, therefore, "it is necessary . . .for for one to show the coercive effect of the enactment as it operates against him in the practice of religion." *Abington School District v. Schempp*, 374 U.S. at 223. In order to enjoy immunity from otherwise valid governmental regulation, the very actions interdicted by the regulation "must be rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. at 215. The statute before the court in this case does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenents and therefore as in *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) the unemployment statute is not a violation of the First Amendment rights of the Petitioners.

The Petitioners have not pointed to any *specific* religious beliefs or practices that conflict with inclusion of employees in its school under the Federal-State Unemployment Compensation Program. Assumingthat Petitioners' claim relates to the alleged financial burden of FUTA, Petitioner fails to meet the burden of demonstrating a violation of the Free Exercise Clause. The court has refused to invalidate laws on free exercise grounds merely because they "make the practice of . . . religious beliefs more expensive," an effect which may, concededly, result from the Secretary's interpretation. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (rejecting a challenge to Sunday closing laws by Orthodox Jewish merchants), *Mitchell v. Pilgrim Holiness Church Corp., supra*, (churches engaging in interstate commerce must pay minimum wage). This court noted in *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1942):

> We do not mean to say the religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

This case, is therefore, unlike the challenge brought by the parents of Amish children to Wisconsin's compulsory school attendance law. The Court's decision in that case was based on the fact that any compulsion would force the Amish to change their entire "way of life." *Wisconsin v. Yoder*, 406 U.S. at 221. The Court

feared that recognition of the state's claim would "call into question traditional concepts of parental control over the religious upbringing and education of their minor children." *Id.* at 231. No such claims can be made with respect to the effect of unemployment compensation coverage of parochial elementary and secondary school employees. It is hard to visualize any change in the "way of life" that would be produced by the unemployment insurance coverage, much less a change of the magnitude that was caused by the compulsory school attendance law in *Yoder*.

Any characterization of the South Dakota Unemployment Compensation Act as "coercive" is further weakened by the fact that the Petitioners may elect the reimbursement method to meet its obligations under the state unemployment compensation law. Employers electing the reimbursement method make payments in lieu of contributions into the state unemployment compensation fund. An employer electing the reimbursement method is liable only for those amounts paid out to the employer's former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed. Rather, the filing of a claim and the meeting of eligibility requirements are conditions precedent for the receipt of benefits and resulting liability of an employer. Hence, unless and until a claim is made by an eligible employee, Petitioners electing the reimbursement method will not be required to pay any amount into the state's unemployment fund. Coverage does not automatically result in the levy of a flat tax on these employers. Such a statutory scheme, wherein it is conceivable that no liability may occur, can hardly be characterized as "coercive," and it will have little, if any, impact upon plaintiff's religious practices.

B. *Coverage of parochial school employees under the federal-state unemployment compensation program is justified by a compelling governmental interest.*

Coverage of parochial school employees by the South Dakota Unemployment Compensation Act is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for employees who find themselves without employment so that they have the resources for food, shelter, and other necessities until they are able to secure another job or until the expiration of the statutorily prescribed period for receipt of benefits. The 1976 Amendments furthered this remedial purpose of extending coverage, under the Federal-State Unemployment Compensation program, to employees of nonprofit elementary and secondary schools. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 1 (1975). Congress determined these amendments were needed, in part to avoid further spreading of the ripple effects of unemployment throughout the national economy.[8]

These legislative objectives must be evaluated in light of the following principles. First the government may not prohibit or burden religious beliefs, however, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably

[8] Congressional authority to enact the Unemployment Compensation Amendments of 1976 derives from its authority to "lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. Art. 1, § 8(1). The congressional power to implement the unemployment compensation program has been consistently upheld on the basis of this constitutional grant. *Steward Machine v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal*, 301 U.S. 495 (1937). See also *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1946) (holding that Congress has great latitude in fixing the terms upon which its money allotments and tax credits may be conditioned.

restricted by neutral legislation. *Braunfeld v. Brown*, 366 U.S. 599, 603. See *McDaniel v. Paty*, 98 S.Ct. 1322, 1329, n.8 (1978); *Reynolds v. United States*, 98 U.S. 145, 166 (1879). Second, governmental regulations that inhibit conduct mandated by religious beliefs, if justified by "interests of the highest order and those not otherwise served, can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. at 215. See *Sherbert v. Verner*,[9] 374 U.S. 398, 403 (1963). Application of these principles demonstrates that the Secretary's interpretation of the 1976 Amendments does not violate the Free Exercise Clause of the first amendment.

The courts have repeatedly upheld social and regulatory programs which further an important governmental interest even though such programs may have an incidental effect upon the free exercise of religion. Almost 100 years ago, the Supreme Court upheld the polygamy conviction of a Mormon who claimed that his religion required him to engage in that practice. *Reynolds v. United States*, 98 U.S. 145 (1879). The Court explained that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164. The

[9] In *Sherbert*, the Court held that the State's denial of unemployment compensation to a Seventh Day Adventist who refused to work on Saturday violated the Free Exercise Clause. *Sherbert* differs in two significant respects from this case. First, in *Sherbert*, there was a much more direct burden placed upon individual's religious practices. The applicant was forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand and abandoning the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 405. Second, the State's asserted interest in preventing the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work was not sufficiently compelling so as to justify the burden placed on the plaintiff. *Id.* at 407. This interest is significantly less important than those of which would result from unemployment compensation coverage of parochial school employees, i.e., assisting individuals during periods of unemployment and averting the detrimental impact of such unemployment upon the national economy.

Supreme Court has also upheld a governmental system of compulsory vaccinations, despite objections, on a religious basis. *Jacobson v. Massachusetts*, 321 U.S. 158 (1944). More recently, the Supreme Court upheld Sunday closing laws over the objections of individuals whose religious practices required them to close their businesses on Saturday. *Braunfeld v. Brown*, 366 U.S. 599 (1961). Chief Justice Warren's plurality opinion in *Braunfeld* observed that the impact of the law on those challenging it "may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." The opinion further concluded:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.
>
> *Id.* at 606.

Neutral legislation indirectly impinging on the right to act upon religious convictions has been upheld by lower Federal courts in a wide variety of situations where the governmental interest in promoting social and economic objectives has been deemed paramount. For example, Federal Communications Commission regulations requiring enforcement of antibias regulations with respect to job positions were unsuccessfully challenged by a licensee owned by a religious organization. *King's Garden, Inc. v. Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), certiorari denied, 419 U.S. 996 (1974). Another court held that a limitation of wheat production imposed by the Agricultural

Adjustment Act of 1938 did not violate an individual's right of religious freedom although it was against his religious principles to limit his farm production. *United States v. Kissinger*, 250 F.2d 940 (3rd Cir.), certiorari denied, 356 U.S. 958 (1958).

Of even more relevance are a number of cases which have held that the failure to grant tax exemptions to religious organizations did not violate the free exercise clause. *Watchtower Bible and Tract Soc. v. Los Angeles County*, 181 F.2d 739 (9th Cir.), certiorari denied, 340 U.S. 820 (1950) (state personal property tax levy upon religious literature); *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (5th Cir. 1966), certiorari denied, 385 U.S. 1026 (1967) (a foundation pursuing a substantially nonexempt purpose in the publication and commercial exploitation of the writings of the director of the foundation was not entitled to a tax exemption as a religious organization under the federal Internal Revenue Code). The court in *Parker* observed:

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution.

Id. at 795. The Secretary's interpretation of Section 3309(b) is not contrary to the Free Exercise clause. The Secretary's interpretation scrupulously avoids any inquiry into the merits of particular religious doctrines and will result in the non-discriminatory enforcement

as applied to all nonprofit elementary and secondary schools.[10]

Another pertinent case in *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F.2d 879 (7th Cir.) certiorari denied, 347 U.S. 1013 (1954). In this case, the court held that the refusal to comply with the federal minimum wage law could not be justified on religious grounds. The court first determined that the Fair Labor Standards Act did not significantly impinge upon the free exercise of religion so as to constitute a violation of the First Amendment. In a description that is equally applicable to the Secretary's interpretation of the Federal Unemployment Tax Act, the court stated that the Fair Labor Standards Act "does not in this case *prohibit* the free exercise of religion by the defendant nor does it *lay a flat tax* on the privilege" (emphasis in original). 210 F.2d at 883. The court then concluded that the remedial nature of the Fair Labor Standards Act—"to insure to the workers of the

[10] The Court referred to the argument that the failure to tax a religious institution may constitute a violation of the Establishment Clause of the First Amendment. An individual or institution which receives a tax exemption on the basis of religious criteria is receiving a form of indirect aid in the sense that resources which would otherwise be used for payment of the tax are now available for the financing of other, presumably religious activities.

This argument retains vitality notwithstanding the Supreme Court's decision in *Waltz v. Tax Commissioner of New York*, 397 U.S. 644 (1970). In *Waltz*, the Court refused to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship. The Court's opinion in *Waltz* was careful to point out that the statutory scheme contained two significant features. First, the exemption did not single out one particular church or religious group or even churches as such. Rather, it was part of an exemption available to "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. Second, the exemption was limited to religious properties used solely for religious purposes. *Id.* at 666.

These limitations of the *Waltz* holding can be used to evaluate the petitioner's interpretation of the 1976 Amendments. A broad reading of 26 U.S.C. § 3309(b)(1) to include employees of parochial elementary and secondary schools would single out churches for favored treatment. Nor would it be limited, as was the scheme in *Waltz*, to religious properties used solely for religious purposes, since it would include employees performing secular functions. Plaintiff's reading of § 3309 would, therefore, raise serious Establishment Clause problems.

United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living"—justified any incidental impact upon their employer's free exercise of religion. *Id.* at 884.

These cases establish that coverage of parochial school employees, along with all other elementary and secondary school employees, under the Federal-State Unemployment Compensation Program would not contravene the First Amendment. Universal coverage will not have any more than a minimal impact on any religious practice or belief. Furthermore, the remedial purposes of the unemployment compensation program to insure that eligible persons will be able to maintain a minimum standard of living during periods of unemployment will not have a ripple effect on the national economy—are sufficiently compelling to override any incidental burden on the free exercise of religion.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*, as such, *Cantwell v. Connecticut*, 310 U.S. 296. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105.

When St. Martin's closed its doors in 1979, it was not the male minister teachers of the church, nor the female teachers, who became unemployed. The people effected were the two cooks and the janitor who had no income nor resources. This class of employees and the

deprivations they face when unemployed; caused Congress to pass social legislation to protect them.

> Nor is there any intimation that the minimum standard of living as fixed by the Act is not just as necessary to the health and well-being of the defendant's employees as it is to the health and well-being of the employees of any other printing establishment. *Mitchell v. Pilgrim Holiness Church Corp.* 210 F.2d 879, 884.

The legislative purpose is neither the advancement nor the inhibition of religion. The advancement of a social purpose for the benefit of all workers, that places no burden on the belief of the Petitioner is the goal of the legislation. While the Petitioners claim that the excessive entanglement standard of the establishment cases should be applied to the Free Exercise Clause, they fail to state what religious practice will be burdened or inhibited by the payment of the unemployment tax.

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. *Braunfeld v. Brown*, 366 U.S. 599, 6 L.Ed.2d 563, 568.

In *Walz v. Tax Commission, supra*, the court found that the purpose of tax exemptions for churches and other nonprofit organizations was neither the advancement nor the inhibitition of religion. In this case the purpose of the law is neither the advancement nor the inhibition of religion, but the achievement of a social goal which is within the constitutional power of the Congress and the legislature of South Dakota to attain.

The grants of tax exemption in *Walz* dealt with the historical exemption of church from property taxes, and the latent dangers inherent in those taxes. The court did not rule out all taxes on churches or their activities. As the court noted, either course, taxation or exemption, occasions some degree of involvement with religion.

V

THE IMPOSITION OF THE UNEMPLOYMENT COMPENSATION TAX DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT NOR ENTANGLE THE STATE IN CHURCH AFFAIRS.

Petitioners contend that the decision of the Referee fosters excessive entanglement by the State contrary to the religion clauses of the First Amendment. The claim is without merit. Excessive entanglement is part of a three-prong test which this court has applied to determine if the establishment clause of the first amendment has been breached. To raise this issue of entanglement, usually the petitioner to the court has claimed that some religion has been established. The Petitioners in this case wish to raise the entanglement issue and at the same time, not claim establishment of religion by letting them avoid a tax that all other private schools have to pay. See *Everson v. Board of Education*, 330 U.S. 1, (1947) (bus transportation); *State v. Cathedral Academy*, 434 U.S. 125 (1977) (record keeping and testing services); *Lemon v. Kurtzman*, 403 U.S. at 614, (1971) (salary supplements to teachers); *Hunt v. McNair*, 413 U.S. 734 (revenue bonds for school

buildings); *Wolman v. Walter*, 433 U.S. 229 (1977) (schoolbooks).[11]

Constitutional law does not prohibit all contact or involvement between church and state, only excessive entanglement. *Lemon v. Kurtzman, supra.* While it is true that the inclusion of certain employees under the State's unemployment insurance law will necessarily call for increased involvement between the State and parochial primary and secondary schools, such involvement does not constitute excessive entanglement repugnant to the religion clauses of the First Amendment. This unmistakable conclusion is reached by an examination of the cases defining the sometimes elusive borders defining the permissible contact between the two institutions.

The First Amendment providing that "Congress shall make no laws respecting an establishment of religion as prohibiting the free exercise thereof" was intended to erect a high, impregnable wall between church and state. *Everson v. Board, supra.* However, no perfect or absolute separation is possible, *Waltz v. Tax Commissioner of New York*, 397 U.S. 664 (1970) says the Court in *Committee for Public Education v. Nyquist*, 412 U.S. 756 (1973):

> . . . despite Madisons admonition and the sweep of the absolute prohibition of the clause—this nation's history has not been one of entirely sanitized separation between church and state. It has never been though either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these clauses

[11] The tax exempt real estate of religious bodies in the United States is worth over $150 billion. In 1978 religious organizations and causes received $18.4 billion in money. Charity U.S.A. by Carl Bakal, p. 10, 11, 1979 Times Book Publisher.

> have presented some of the most perplexing questions to come before this Court.
>
> Thus the high wall of separation in modern interpretation has become 'a blurred indestinct and variable barrier depending on all the circumstances of particular relationship.' *Lemon v. Kurtzman*, 403 U.S. at 614, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971).

Petitioners claim that removal of the exemption would foster excessive entanglement between church and state in three situations applicable to this case. The first situation invisaged by the Petitioners is the State's determination of whether an employee is laid off or fired. The second situation troubling to the Petitioners involves the determination of the amount of time spent by employees working at both church and school. Lastly, Petitioners claim that the state has already become excessively entangled with the church since the Appeals Referee made findings of fact relating to the church and its relationship to the school. None of these situations present entanglements of constitutional proportions as is evidenced by examination of representative cases delineating acceptable involvement and excessive entanglement between church and state.

Everson v. Board of Education, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392, reh. den. 330 U.S. 855, 91 L.Ed. 1297, 67 S.Ct. 962 (1947) is the first modern case defining the establishment clause. The court sustained a New Jersey program that provided reimbursement to parents of money expended by them for the bus transportation of their children including parents of children attending parochial schools were also reimbursed. The court held that the establishment means that:

> Neither a state nor the Federal Government can set up a church. Neither can they pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can they force nor influence a person to go or remain away from church against his will, or force him to profess a belief in any religion.
>
> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers, it does not require the state to be the adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

The court held that the program provides help to parents to get their children, regardless of religion, safely to and from school.

In *Waltz v. Tax Commissioner, supra*, a taxpayer brought suit to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. The court held that the exemptions were not violative of the religion clauses since exemptions were granted to all houses of worship within a broad class of property owned by nonprofit, quasi-public corporations which included libraries, playgrounds, and thus did not single out religious organizations for special treatment. Further, the court held that the exemptions created minimal and remote contacts to a lesser degree than would be required by tax valuation.

In *Lemon v. Kurtzman, supra*, the Court struck down statutes of Rhode Island and Pennsylvania as violative of the religion clauses of the First Amendment. The Pennsylvania statutes provided state reim-

bursement of non-public elementary and secondary schools for the cost of teacher's salaries, text books and instructional materials. Under the Pennsylvania statute, participating schools were required to identify the cost of secular educational service by prescribed accounting procedures. The accounts were subject to state audit. Reimbursement was limited to courses presented in the public schools. The Rhode Island statute provided payment of up to fifteen percent annual salary supplements to teachers of secular subjects in non-public elementary schools. The teachers were required to teach only subjects taught in public schools, using materials used in public schools. The teachers were required to give a written agreement not to teach a course in religion while receiving salary supplements. The courts held that the statutes fostered excessive entanglement since comprehensive and continuing state surveillance would be required to insure that the restrictions as to the secular instruction were obeyed. Further, that the state's examination of the school's financial records to determine which expenditures were religious and which were secular would involve danger of excessive entanglement between church and state. Further, that continuing annual appropriations required under the statute would intensify political fragmentation and divisiveness on religious lines.

In *Tilton v. Richardson*, 403 U.S. 672, *reh. denied*, 404 U.S. 874 (1971), 120 taxpayers in Connecticut challenged the constitutionality, under the establishment clause, a federal statute which authorized aid in the form of construction grants for buildings and facilities to be used for secular educational purposes to colleges including private, religiously affiliated colleges. The

grant prohibited use of the funds for sectarian instructions and worship as in connection with the program of a divinity school or department. The Government retained only a twenty-year interest in the facilities and the prohibitions were enforced by on-site inspections. While striking down the twenty-year limitation on the government's involvement, the court upheld the program finding that the statute reflected a legitimate secular objective of assisting in providing facilities for higher education. This Court further found that the government's administration did not foster excessive entanglement even though the buildings were subject to government inspections.

More recently, the court in *Wolman v. Walter*, 433 U.S. 229 (1977), upheld provisions of an Ohio statute authorizing expenditures of public funds to provide, inter alia, speech, hearing and psychological diagnostic services (available to public school children) to parochial students while striking down, as violative of the establishment clause provisions, that authorized expenditures for, inter alia, secular instructional materials such as tape recorders, maps and globes.

Thus, a consistent pattern emerges. The Constitution will not tolerate those programs *that require constant surveillance or supervision of the states to police its provisions and that single out churches or church-related schools for preferential treatment.*

As to the first situation the State admits that different benefits accrue in the program to those employees that are laid off and those that are fired. However, this does not mean that the State is going to jump into the middle of sculptural disputes between church and teacher. This case presents a unique situation in that

none of the teachers are under contract. Instead they receive a "call" from the church. There are only two ways that a teacher may be released from the call. One is by teaching false doctrine and the second by misconduct as is outlined by the call and ordination installation. In both instances the rules are regulated by internal doctrinal matters controlled by the church. The State therefore needs only to determine whether the employee was fired or laid off. The employee will, as before, be left to the mercy of his/her churches firing practices.

The Respondents place undue reliance on the case of *Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112 (7th Cir. 1977). In that case the NLRB sought to exercise jurisdiction over parochial schools.

In finding that NLRB coverage of parochial schools raised "serious constitutional question" (albeit without finding unconstitutionality) the Court expressed two concerns; one of which can be best described as involving the "chilling effect" of mandatory collective bargaining on the ability of clerical authorities to administer their schools and then relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting.

The majority of the Seventh Circuit was troubled by the requirement of negotiating "terms and conditions" of employment.

The Seventh Circuit opinion characterized the bargaining problem by suggesting that after collective bargaining, "No longer would the bishop be the sole repository of authority as required by Church law . . . the bishop has now to share 'some decision-

making' with the union." 599 F.2d at 1123. Unemployment insurance coverage does not create this kind of intrusion. Clearly unemployment insurance coverage does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered after an employee had been terminated and his or her connection with the school severed.

Obviously, the second area of the Court's concern regarding unfair labor practice adjudications does raise some possible parallels with certain aspects of the unemployment insurance system, but since these problems arise because of state law provisions and not because of FUTA, the proper inquiry must be at that level.

SDCL 61-1-13 and -14 provides for denial of benefits for certain time limits in cases where the applicant quit voluntarily without good cause or was discharged for misconduct in connection with the work. Since the "good cause" involved is the claimant's and not the school's there is no entanglement problem there. With respect to the discharges for misconduct, we presume that Petitioners' real concern is that the inquiry into what constitutes "misconduct" in connection with employment in Petitioners' schools is difficult to the point of unconstitutionality. This is not an inevitable result however. Taking one of the examples used in the circuit court in *Catholic Bishop*, 559 F.2d at 1125, involving a teacher discharged for teaching biology in a manner contrary to church doctrine, it seems likely that such an individual would be denied unemployment

benefits for misconduct without necessity of any inquiry into the correctness of church doctrines on the subject. But what if the State did attempt such an inquiry? Assuming, but not conceding, such an approach is unconstitutional, the school could challenge *that* action on first amendment grounds and such a question could be resolved. The point is simply this, potential entanglements cannot be used to negate any possible unemployment insurance coverage of church school employees since coverage does not *inevitably* create any entanglements. Unless the court is prepared to reject any coverage of Petitioners' schools on pure Free Exercise grounds, i.e., the "coercive" financial impact of unemployment insurance coverage, the Petitioners are entitled to no relief as to the State. Nothing in the State's interpretation of FUTA will create "entanglement."

The fact that the "entanglements" which apparently troubled the courts in *Catholic Bishop* are not necessarily present under unemployment insurance is not the only distinction between the two situations. The power of the NLRB to order reinstatement with back pay and to utilize judicial authority to enforce its ruling is certainly significant. The religious organization may, therefore, be faced with the dilemma of presenting a defense which might in some manner implicate the purely religious activities of the organization or being forced to re-employ an individual whom it deems unsatisfactory. No such dilemma exists under unemployment insurance because the church school employer always remains free to employ or not to employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now have some financial impact, albeit an impact no greater than

that borne by private non-sectarian schools.[12] Yet there is no basis whatsoever for Petitioners' apparent belief that their employer/employee relations are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F.2d 879 (7th Cir.), cert. den., 347 U.S. 1013 (1954), and we assume that they acknowledge their obligation to maintain a safe workplace under OSHA or to provide for work-related injuries under the South Dakota Workmen's Compensation Act. What sets unemployment insurance apart? In the brief submitted by the Petitioners to this court, this one crucial question remains unanswered.

The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The State seeks no alteration in that principle. The Petitioners now demand a radical departure from precedent. The Petitioners now desire a previously unrecognized blanket immunity from any governmental control of their relation with their employees based upon their religious motivations. The State in no way seeks to question or examine Petitioners' motivations in establishing elementary or secondary schools or in following a particular method of instruction. The State's position is uncomplicated. Employees of *all* elementary and secondary schools are covered by FUTA. Where such school activities are performed, Section 3309(b)(1) is not available as an ex-

[12] The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfeld v. Brown*, 366 U.S. 599 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive. 366 U.S. at 605.

emption to Petitioner. Coverage of elementary and secondary school activity, no matter what the motivation of the school administrators, was intended by Congress to protect former employees from the viscisitude of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation which offends the First Amendment. That plea for special treatment should be rejected.

The second situation bothering the Petitioners involves the determination of the time spent by employees working at both church and school. Appellant cites as examples the janitor who may work in both the church and school buildings and the teacher who may sing in the church choir and teach Sunday School. Neither situation presents difficulties of constitutional proportions. Both of the churches and schools in the instant case are separate buildings. The situation presented here is not unlike the situation in which the churches pay an income tax on unrelated business income. See 26 U.S.C. § 512(b)(16). Such situations have never been held as constitutionally repugnant to the religion clause. *Gibbons v. District of Columbia*, 116 U.S. 404, 29 L.Ed. 680, 6 S.Ct. 427 (1886), also *Mitchell v. Pilgrim Holiness Church Corporation, supra*, liability of church for payment of minimum wage.

Finally the Petitioner contends that the State has already become excessively entangled with the church since the Appeals Referee made the following findings of fact:

> The object and purpose of the Synod, as set forth in its constitution, is to 'extend and conserve the true doctrine and practice of the Evangelical Lutheran Church.' One method of achieving this is

> by 'establishing and maintaining theological seminaries, colleges, academies, schools, and other institutions.'
>
> The Synod believes a theological basis exists for their schools. It holds the conviction that training of the youth involves both education and religion and that the two are so closely interwoven they can not be separated. They operate school programs in accordance with these beliefs.
>
> All education courses offered at the School are taught from a religious viewpoint based on the scriptural convictions held by members of the Wisconsin Evangelical Lutheran Synod.

The Appeals Referee then found "... that the primary purpose of the school is education and they are not exempt under this section." It is not improper for the State to find facts as to the nature of the religious school. The facts found by the referee echo findings in Supreme Court cases. In *Lemon v. Kurtzman*, 403 U.S. 602, the court states that the purpose of parochial schools is to inculcate religious values and belief and that "the parochial schools constituted an integral part of the religious mission of the Catholic church." 29 L.Ed. 747.

The Referee in this case made findings from uncontroverted evidence submitted to the tribunal. In making these findings and conclusions, the Appeals Referee is no more entangling itself with church matters than the Supreme Court is entangling itself with the churches in the various "parochade cases."

CONCLUSION

The Supreme Court of South Dakota has correctly interpreted SDCL 61-1-10.4 and 26 U.S.C. 3309 as it applies to Petitioners in this case. The South Dakota Court has followed congressional intent in interpreting this law and has also followed this court's rulings in applying the boundaries of First Amendment rights. Therefore the Respondents request that the request for the Writ of Certiorari be denied and the decision of the Supreme Court of South Dakota remain unaltered.

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